No. 94-1506

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1994

JEROME S. WAGSHAL,

Petitioner, Pro Se,

vs.

MAURICE BRAMON, *et al.*,

-and-

BARNETT BANKS, INC., *et al.*,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS MAURICE BRAMON, *et al.*

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Respondents, Maurice Bramon, John Heller, Harvey Karp, Howard Weiner, Richard Rosenberg and Theodore Rosenberg ("Class Plaintiffs"), submit this brief in opposition to the Petition for Certiorari.

STATEMENT OF THE CASE

The Petitioner in this action seeks certiorari review of a per curiam dismissal of the Petitioner's appeal for lack of standing. Petitioner, proceeding *pro se*, is an objecting Class Member to a class action settlement. Petitioner is also an attorney admitted to practice before this and other courts throughout the United States. Notwithstanding clear authority in the Eleventh Circuit requiring intervention under Rule 24, Fed. R. Civ. P. ("Rule 24") in order to perfect rights to appeal, Petitioner failed to do so in the Circuit Court and now challenges the dismissal of his appeal by attacking the precedent he failed to follow.

This action arose as a consolidation of several shareholder actions. The Class Plaintiffs' claims were brought under Section 10(b) of the Securities Exchange Act of 1934 on behalf of open market purchasers of the common stock of Barnett Banks, Inc. ("Barnett") between March 1989 and March 1990. The litigation was extremely hard fought. On October 28, 1991, the case was settled for $1,300,000 in warrants and $300,000 in cash. Plaintiff's counsel (who had expended over $55,000 in costs and incurred approximately $750,000 in attorney's time), petitioned for an award of counsel fees and costs of $300,000 in cash and $50,000 in warrants. The settlement and the fee were approved over the objections of Jerome Wagshal, the Petitioner in this Court, who claimed to be the purchaser of 26 shares of Barnett's common stock.

After extensive document discovery in the District Court, Plaintiffs' counsel determined that the case should be settled.

Discovery raised concerns as to the ability of Plaintiffs to establish liability, and the intervening increase in Barnett's publicly traded stock price raised serious concerns about the continued viability of the case. While Barnett's stock price had fallen from $30.62 to $29.38 after the announcement of reserve increases on March 16, 1990, by August 1991 the stock had recovered to the point where it was trading at over $35 per share. The parties focused on a settlement comprised of warrants in order to give Class Members the opportunity to benefit from Barnett's increasing stock price. Having determined that the litigation should be resolved by the issuance of securities which enabled Class Members to potentially share in Barnett's successful recovery from the Florida real estate recession, class counsel retained an investment banking firm to assist in obtaining the best warrants available for the Class. The Defendants retained their own investment bankers to advise them.

The parties then proceeded to negotiate over a period of several months on the issues of the duration and the exercise price of the warrants. It was ultimately agreed that the warrants would have a ten-month duration, and the exercise price would be the lower of $45.50 or 1.4 times the closing price of Barnett common stock on March 31, 1992. The actual exercise price ultimately was $44.80 under this formula. (This price was ultimately exceeded, but not until after the warrants had expired.) Both Plaintiffs' and Defendants' investment banking firms rendered opinions that the warrants were worth $1 each at the time they were issued.

Petitioner objected at the settlement hearing, filed papers in opposition to this settlement, but never bothered to move to intervene under Rule 24.[1] While Petitioner argued various

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1. Having failed to intervene and properly become a party to the litigation, Petitioner suggests he was somehow treated as if he were a party. (Cont'd)

jurisdictional points with Appellee Barnett after filing his Notice of Appeal, Appellee/Class Plaintiffs did not participate in the various motions filed by Barnett. Upon the filing of their answer brief in the Circuit Court, the Class Plaintiffs pointed out that the Petitioner lacked standing to prosecute this appeal by reason of his failure to formally intervene under Rule 24.[2] The Eleventh Circuit agreed and summarily dismissed the appeal.

REASONS FOR DENYING THE WRIT

THERE ARE NO "SPECIAL AND IMPORTANT" REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI.

There are no "special and important" reasons for the granting of a writ of certiorari in this case as required by Rule 10.1 of the Rules of this Court. The principal argument advanced by Petitioner for the granting of a writ of certiorari is that a conflict exists among the Circuits as to the requirement to intervene under Rule 24 as a party to the litigation in order to have standing to appeal a final order in a class action brought under Rule 23(b)(3) Fed. R. Civ. P. There is hardly a conflict among the Circuits on this issue. Indeed, every Circuit that has addressed this issue since 1987 has adopted the same holding as *Guthrie v. Evans*, 815

(Cont'd)

Neither Class Plaintiffs nor Barnett nor their respective counsel considered or treated Petitioner as a party, and there is no basis for the suggestion that Petitioner's standing was "conceded *sub silentio*." Petition for Writ of Certiorari (hereinafter "Petition for Cert."), p. 7.

2. Since a single judge on a motion calender is without authority to dismiss an appeal pursuant to Rule 27(c) of the Federal Rules of Appellate Procedure, the Appellee's brief was the appropriate time to raise the fact that the Appellant had failed to follow the clearly articulated holding of prior Eleventh Circuit case law by not intervening pursuant to Rule 24.

F.2d 626 (11th Cir. 1987), in the context of a Rule 23 class action. There is no court that has specifically addressed the question presented here and decided the issue in a manner contrary to *Guthrie*. The decisions on which Petitioner relies to create some "conflict" on this procedural question are cases in which the issue was simply never addressed; discussed only in *dicta;* or decided in the context not of a class action, but of a shareholder derivative action brought under Rule 23.1, where the shareholder has no claim independent of the corporation.

Petitioner's mischaracterization of the factual background of the settlement also does not provide grounds for certiorari review. This case was settled after extensive, hard fought litigation, when the parties were in a position to evaluate the merits of the case. At the eleventh hour, Petitioner, the holder of 26 shares of Barnett stock, appeared and objected to the settlement for reasons known only by Petitioner. Petitioner's rhetoric does not change that fact, or in any way suggest a basis for further review.

ARGUMENT

I.

THERE IS NO MAJOR CONFLICT AMONG THE CIRCUITS, AND THIS COURT HAS TWICE REJECTED CERTIORARI PETITIONS ON CASES RAISING THE SAME ISSUES ADVANCED BY PETITIONER.

This Court has twice denied certiorari in cases which presented the same standing issue on which Petitioner seeks certiorari review. *See Croyden Associates v. Alleco, Inc.*, 969 F.2d 675 (8th Cir. 1992), *cert. denied,* 113 S. Ct. 1251 (1993); *Shores v. Sklar,* 844 F.2d 1485 (11th Cir. 1988), *cert. denied,* 493 U.S.

1045, 110 S. Ct. 843 (1990). This suggests that this Court, both in 1990 and 1993, determined that the issues advanced by Petitioner are neither "special" nor "important" within the meaning of Supreme Court Rule 10, and further that the conflict suggested by Petitioner is neither as real nor as significant as Petitioner suggests.

A. Subsequent to *Marino v. Ortiz*, the Circuit Courts Are Unanimous in the View that Intervention Under Rule 24 Is Required to Obtain Standing to Appeal a Final Order Approving a Class Action Settlement.

In *Marino v. Ortiz*, 484 U.S. 300, 108 S. Ct. 586 (1988), this Court was faced with an appeal from a final hearing approving a consent decree in settlement of an action brought under Title 7 of the Civil Rights Act of 1964. The action was brought on behalf of Black and Hispanic police officers. The petitioners, while not absent class members, were officers who would be affected by the final judgment in the case and, thus, had a legally cognizable interest at stake. The petitioners had failed to intervene, but had lodged their objections before the district judge. This Court held that "since petitioners were not parties to the lawsuit, and because they failed to intervene for purposes of appeal, they may not appeal the consent decree." 484 U.S. at 304, 108 S. Ct. at 587. In so doing, this Court adhered to the rule that only parties to a lawsuit, or ". . . those that properly become parties . . ." may appeal a final judgment. *Id.* This Court in *Marino* went on to note that while the Court of Appeals had suggested there may be exceptions to this rule, ". . . we think the better practice is for such a non-party to seek intervention." 484 U.S. at 305, 108 S. Ct. at 588.

In the year prior to the Court's holding in *Marino*, the Eleventh Circuit, in *Guthrie v. Evans*, 815 F.2d 626 (11th Cir. 1987), held that in order to preserve the right to appeal from a

class action settlement, a class member must formally intervene under Rule 24. Subsequent to this Court's holding in *Marino,* every Circuit Court that has addressed this issue squarely in the context of a Rule 23(c) settlement has held that, absent intervention, a non-party class member has no standing to appeal. *See Schultz v. Champion International Corp.,* 35 F.3d 1056 (6th Cir. 1994); *Gottlieb v. Wiles,* 11 F.3d 1004 (10th Cir. 1993); *Loran v. Furr's/Bishop's, Inc.,* 988 F.2d 554 (5th Cir. 1993); *Croyden Associates v. Alleco, Inc.,* 969 F.2d 675 (8th Cir. 1992); *Walker v. City of Mesquite,* 858 F.2d 1071 (5th Cir. 1988). In addition, the Seventh Circuit in *In the Matter of VMS Partners Litigation,* 976 F.2d 362, 368 (7th Cir. 1992), found "*Guthrie's* analysis persuasive where an unnamed class member . . . is appealing a post-settlement order implementing the settlement agreement." *Id.*

Post *Guthrie* and *Marino,* there has been virtually no contrary view on this issue in the context of a class action settlement. In order to appeal a final judgment approving a class action settlement, one must take the relatively simple step of intervening under Rule 24 as a party plaintiff.

The rationale of *Guthrie* and subsequent cases is clear. Rule 23 establishes a procedure whereby a class representative acts as a fiduciary on behalf of the class. An individual who has some interest in the outcome of litigation, but does not assume the fiduciary responsibilities of the class representative, cannot act on behalf of the class. The notion of non-parties bringing appeals, often when they take interest in the litigation only at its conclusion, is contrary to the framework for representative litigation set forth in Rule 23. Just as merely having an interest in the outcome of litigation was held by this Court in *Marino* to be insufficient to confer standing, "merely the interest of unnamed, non-intervening class members in the outcome of the class litigation is insufficient to confer standing upon them." *Shults v. Champion International Corp.,* 35 F.3d at 1060.

There can be no claim that, absent standing to appeal, substantive rights will be jeopardized. Class members have adequate procedures under the Federal Rules of Civil Procedure to protect their substantive rights. As *Guthrie* and subsequent cases point out, class members may intervene under Rule 24 by filing a motion for intervention in the district court. The denial of such a motion is appealable. A second alternative is that a class member, if dissatisfied with the representation in the class action, may pursue a collateral proceeding. A third option is that a class member may simply opt out of the class under Rule 23(c)(2) and thereby not be bound by any final adjudication. *See Guthrie,* 815 F.2d at 628. There are ample means of protecting the substantive rights of absent class members.

If unnamed class members who have not intervened as parties could initiate appellate proceedings without formally becoming parties, class actions would become unmanageable. As *Guthrie* noted, "A fundamental purpose of the class action is to render manageable litigation that involves numerous members of a homogeneous class. . . ." *Guthrie,* 815 F.2d at 629. When procedural protections afforded class members under Rules 23 and 24 are balanced against the specter of unwieldy litigation and the loss of manageability in class litigation, there is no question that the balance tips in favor of precluding appeals by those who have failed to take the rather simple step of intervention under Rule 24. As the Court in *Gottlieb v. Wiles* noted:

> If individual appeals without formal intervention were permitted, the class action would break down under the burden of unpredictable and unlimited individual actions. Such a result would directly conflict with the goals of Rule 23 and would eviscerate the utility of the class action suit.

As this Court squarely held in *Marino,* the right to bring appellate review of an adverse judgment is limited to a party. The better practice is to adhere to that limitation, particularly in light of the procedures whereby one can relatively easily become a party through intervention under Rule 24 and, if necessary, appeal the denial of the requested intervention.

B. Petitioner's Claimed Conflict Among the Circuits Is Illusory.

Petitioner suggests "an almost evenly balanced conflict among the circuits" exists on the question of whether intervention is required (Petition for Cert., p. 11). This "almost evenly balanced" conflict apparently rests on the theory that three of the eight Circuits that have addressed this question have found that intervention is not required. This dissenting view is held supposedly by the Third, Seventh and Ninth Circuits. A careful reading of the citations advanced by Petitioner, however, shows that the purported conflict is neither clear, nor evenly balanced.

The only authority Petitioner cites for the notion that the Ninth Circuit adheres to his view is *Marshall v. Holiday Magic, Inc.*, 550 F.2d 1173 (9th Cir. 1977). That case, decided a decade before *Guthrie* and *Marino,* did not squarely address the question of whether intervention under Rule 24 is required to obtain standing to appeal a class action settlement. *Marshall* arose out of a settlement of a class action involving a pyramid scheme. Numerous class actions with differing and somewhat conflicting definitions of the class were consolidated into one action. After the case was settled, an appeal was brought by an entity sued as a defendant in one case, but also part of a defined plaintiff class in another of the pending actions. While it was appellant's status as a class member that ultimately served as a basis for standing to appeal, the issue of whether formal intervention under Rule 24 was required was never raised by the parties or addressed by the

Court. That may have been due to the fact that appellant was technically a "party" by reason of having been named as a defendant in one of the consolidated actions. The Court's opinion, however, is devoid of any analysis of the question of whether intervention as a party under Rule 24 was required.

The notion that the Seventh Circuit law conflicts with the prevailing view articulated in *Guthrie* is also highly questionable. Petitioner cites a 1970 opinion of the Seventh Circuit, *Research Corp. v. Asgrow Seed Co.*, 425 F.2d 1059 (7th Cir. 1970), in support of the view that the Seventh Circuit does not require formal intervention to obtain standing to appeal. A review of that opinion, however, and subsequent opinions that have considered it, suggest Petitioner's view is misplaced. *Asgrow* arose out of a consent judgment as to the validity of a patent and an infringement of that patent, and an anti-trust action. The anti-trust action was maintained as a class action under Rule 23(b)(3), from which there is a right to opt out. The infringement action was maintained as a class action under Rule 23(b)(1) and (2), from which there is no right to opt out. With respect to the anti-trust action, at footnote 2 the Court specifically stated:

> We need not consider the factual questions concerning the degree of participation by appellants in the settlement hearing and negotiations *since the failure of appellants to formally intervene, after receipt of notice under Fed. R. Civ. P. 23(e) before final judgment forecloses their right to appeal.*

Asgrow, 425 F.2d at 1060, n.2 (emphasis added). The confusion in the reading of *Asgrow* arises from the further statement by the court with respect to the non-opt out class claims under Rule 23(b)(1) and (2) that one who intervenes, or "even appears in response to a notice," may maintain an appeal.

In *Gottlieb v. Wiles*, 11 F.3d at 1011, the Tenth Circuit squarely pointed out that *Asgrow* did not support the notion that formal intervention was not required. After pointing to the above-quoted footnote, the court in *Gottlieb* stated:

> Thus, in the only portion of the *Asgrow* decision directly parallel to the situation in this case, the Seventh Circuit held that formal intervention was a prerequisite to the right of appeal.

Id. As the *Gottlieb* court noted, *Asgrow*, properly read, stands for the same proposition as *Guthrie* in the context of a Rule 23(b)(3) (opt-out) class: "formal intervention was a prerequisite to the right to appeal." *Gottlieb*, 11 F.3d at 1011.

While the notion that *Asgrow* does not require formal intervention in order to appeal from the settlement of an opt-out class under Rule 23(b)(3) is not supported by the case, a recent Seventh Circuit decision suggests that that Circuit is likely to follow *Guthrie* if squarely confronted with this issue. In *In the Matter of VMS Limited Partnership*, 976 F.2d 362 (7th Cir. 1992), a Seventh Circuit panel appeared reluctant to depart from what it construed as the Circuit's prior holding in *Asgrow*, but failed to apply *Asgrow* so as to permit an appeal from a class member who had not intervened. After citing *Guthrie* and finding that its reasoning was "persuasive," the court in *VMS* held that an unnamed class member who had failed to intervene could not appeal a post judgment order implementing the settlement agreement. The Seventh Circuit's opinion in *VMS* is significant because it reflects a clear departure from any notion that a class member who fails to formally intervene has standing to bring an appeal.

Finally, Petitioner's assertion that the Third Circuit has

rejected the *Guthrie* approach is also suspect. While Third Circuit case law suggests a Third Circuit panel might well rule contrary to *Guthrie* in the context of a class action, no Third Circuit panel has squarely done so.

In *Carlough v. Amchem Products, Inc.*, 5 F.3d 707 (3d Cir. 1993), several class members moved to intervene following certification of the class in an asbestos case. The court denied both intervention as of right under Rule 24(a) and permissive intervention under Rule 24(b). In denying intervention, the court granted the absent class members who had sought to intervene "broad rights of participation in the class action," 5 F.3d at 711. The proposed intervenors then took an immediate appeal. The Third Circuit dismissed the interlocutory appeal on the theory that, under its prior holding in *Ace Heating & Plumbing, Inc. v. Crane*, 453 F.2d 30 (3d Cir. 1971), the class members who had been denied intervention would later have a right to appeal from any settlement in the case. The *Carlough* court, in *dicta*, sought to distinguish the contrary holdings in *Croyden, Guthrie* and *Walker*,[3] so as to suggest that an appeal would be available absent intervention. The *Carlough* case stands for the proposition that the denial of intervention cannot be addressed on an interlocutory appeal. The panel in *Carlough* seemed to accept, without really analyzing, the notion that *Ace Heating* holds that one need not seek to intervene as a party to obtain rights to appeal a class action settlement, and did not address whether such a rule makes sense.

Petitioner also relies on *Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304 (3d Cir. 1993). In that case, the Third Circuit held that an objector to a shareholder derivative action brought pursuant to Rule 23.1 had standing to object to a settlement even though he did not file a motion to intervene in the district court. Petitioner suggests that the distinction between a class action and a

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3. *Gottlieb* and *Shults* had not yet been decided.

derivative action is not a meaningful one in the standing analysis. However, the Third Circuit panel in *Bell Atlantic* clearly recognized that that is not the case. In a footnote, the court noted that, "in derivative suits, unlike shareholder class actions, recoveries belong to the corporation on whose behalf the suit was brought." *Bell Atlantic*, 2 F.3d at 1307, n.4. The plaintiff in a class action has a personal claim that can be prosecuted outside the context of the class case. While the court in *Bell Atlantic* suggested that the parties had not addressed the distinction between these types of cases, it points out that at least one rationale offered in support of the intervention requirement does not apply to derivative cases. Specifically, the court noted that in a Rule 23(b)(3) class action a shareholder has a right to opt out of the class and bring in his own separate action. *Id.* In a derivative action, the named plaintiff acts solely as a representative for the corporate entity and has no individual stake or claim that can be pursued independently. The plaintiff in a class action has an individual economic stake in the outcome, because the recovery on a damage claim is paid to the members of the class. In a derivative case, a shareholder who has no monetary interest in the outcome of the case would have little incentive to intervene in an ongoing lawsuit. Thus, the factors noted in *Guthrie* as to Rule 23's protections of substantive rights have no application in the context of a derivative case.

The *Bell Atlantic* opinion is also significant in its characterization of *Ace Heating & Plumbing*. Unlike *Carlough*, the court in *Bell Atlantic* noted only that "it is suggested" in *Ace Heating & Plumbing* that an objecting class member need not intervene to protect the right to appeal.

In fact, the *Ace Heating* opinion did not address the issue of whether intervention under Rule 24 was required. In *Ace Heating*, the primary focus was whether the appellant had somehow ratified the settlement and waived his right to object by

not seeking exclusion from the class. The court correctly rejected that notion, noting that the failure to seek exclusion would not waive substantive rights. The word "intervention" appears nowhere in the *Ace Heating* opinion, as the issue simply never came up.

In summary, the conflict between the Circuits that Petitioner suggests is hardly as clear as indicated in the Petition for Certiorari. At best, the Third Circuit appears to be leaning in a direction contrary to *Guthrie*. The Seventh Circuit is clearly leaning in the direction of *Guthrie* as evidenced by *VMS*, and a close reading of the *Asgrow* opinion suggests that case is actually consistent with the *Guthrie* analysis. Finally, the *Marshall* case in the Ninth Circuit is hardly a countervailing view, since the issue of intervention was never raised or discussed.

On the other side of this "conflict" is the unanimous adoption of the *Guthrie* rationale by every post-*Marino* decision to address this issue. The Fifth, Sixth, Eighth, Tenth and Eleventh Circuits have all held — after extensive analysis of the issue — that only parties may appeal cases to the Circuit Court, and that an absent class member who wishes to affect the rights of numerous other class members must formally intervene as a true party to the litigation.

CONCLUSION

Petitioner has neither articulated any substantive right that is adversely affected by the current law, nor demonstrated any true split among the Circuits. Petitioner simply failed to follow clear Eleventh Circuit precedent that required him to intervene in order to establish the right to prolong this litigation through appeals. That hardly constitutes a basis for a writ of certiorari.

Respectfully submitted,

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